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In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1678.

GEORGE BUCUVALAS,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Brief of the Respondent in Opposition.

FRANCIS X. BELLOTTI,
Attorney General,
STEPHEN R. DELINSKY,
Assistant Attorney General,
Chief, Criminal Bureau,
BARBARA A. H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Division,
ROBERT S. POTTERS,
Assistant Attorney General,
Room 1805,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Brief of the Respondent in Opposition.

Respondent is not dissatisfied with petitioner's citation of the opinion below or his statement of jurisdiction.

Questions Presented.

1. Whether the petitioner's due process right to fair warning of proscribed conduct was abridged by the Massachusetts Appeals Court's interpretation of a Massachusetts criminal statute.
2. Whether the evidence introduced at the petitioner's criminal trial supported the jury's verdict.

Statement of the Case.

Prior Proceedings.

On October 16, 1976, a criminal complaint was issued by the Municipal Court of the City of Boston charging the petitioner with a violation of M.G.L. c. 272, § 6, in that he, being the owner of a place or having or assisting in the management or control thereof, induced or knowingly suffered a female to resort to or be in or upon such place, for the purpose of unlawfully having sexual intercourse. He was convicted of this offense on November 22, 1976, and pursuant to M.G.L. c. 278, § 18, exercised his right to a trial *de novo* in the Superior Court.

On April 20, 1977, after a jury trial, the petitioner was found guilty and sentenced to three months in the Suffolk County House of Correction and ordered to pay a fine of one thousand dollars, with a surcharge of two hundred and fifty dollars.

On appeal the conviction was affirmed by the Appeals Court, *Commonwealth* v. *Bucuvalas*, Mass. App. Ct. Adv. Sh. (1978) 124, and a petition for further appellate review was denied by the Supreme Judicial Court. *Commonwealth* v. *Bucuvalas*, Mass. Adv. Sh. (1978) 826.

Statement of the Facts.

The facts as they appear in the opinion of the Appeals Court may be summarized as follows:

The petitioner was the president and director of the United Food Corporation which did business at the "Two O'Clock Lounge," a barroom located in Boston's adult entertainment area. The entertainment offered by the lounge consisted of nude dancing by females as well as the serving of alcoholic beverages. *Commonwealth* v. *Bucuvalas, supra* at 125.

There was evidence offered at the petitioner's trial demonstrating that his managerial responsibilities included arranging for the entertainment and keeping track of the "girls," who while not dancing mingled with the customers soliciting the purchase of alcoholic beverages for prices up to $150. On the day of his arrest, the petitioner was in the lounge exercising his managerial duties. *Id.* at 125-126.

During the afternoon of October 14, 1976, a male customer spoke with a barmaid in the main room of the lounge; the barmaid summoned Ms. Connie Peria, employed as a dancer for $100 a week, who, after a brief conversation with the customer, accepted $50 from him and gave it to the barmaid.[1] Ms. Peria and the customer then went to a secluded area of the lounge where she subsequently performed fellatio upon the male customer. *Id.* at 126.

At approximately 4 p.m. that day, two Boston police officers entered the lounge, met the petitioner and walked to the rear of the lounge. As they were conversing, Ms. Peria ran from the secluded area clad only in a white negligee. A few seconds later the male customer appeared, told the officers that Ms. Peria had fellated him and additionally

[1] Ms. Peria was tried with the petitioner and convicted of prostitution (M.G.L. c. 272, § 53). She did not appeal.

complained that his wallet had been stolen.[2] The police officers arrested both Ms. Peria and the petitioner. *Id.*

Argument.

I. THE MASSACHUSETTS APPEALS COURT'S CONSTRUCTION OF THE STATUTE UNDER WHICH THE PETITIONER WAS CONVICTED DID NOT IMPROPERLY EXPAND ITS APPLICATION TO THE PETITIONER'S CONDUCT.

The petitioner seeks review by this Court of his Massachusetts conviction on the ground that the judicial construction of the phrase "sexual intercourse" by the Appeals Court enlarged its definition and retroactively applied it to the petitioner's conduct (petitioner's brief, pp. 9-14). The petitioner also asserts that if the Appeals Court's construction of the term was in accord with prior Massachusetts decisions, the act of commercial fellatio which occurred in the petitioner's lounge was not unlawful at the time it occurred and, thus, the petitioner could not have had adequate notice that his conduct was proscribed by law (petitioner's brief, pp. 18-20).

Neither contention merits this Court's granting a writ of certiorari, for the petitioner's conviction was properly affirmed by the Appeals Court. Additionally, there exist adequate state grounds upon which the petitioner's conviction was based. See *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935).

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[2] The customer testified at trial that later that day he in fact found his wallet in his pants pocket.

A. *Proof of Actual Sexual Intercourse is Not an Element of the Offense Committed by the Petitioner.*

In stating the elements of the offense charged against the petitioner, the Appeals Court held that proof of Ms. Peria's actual engagement in sexual intercourse was not required by the statute.

> The offense defined by G.L. c. 272, § 6, may be analyzed as requiring the proof of three elements: (1) that the defendant owned, managed or assisted in the management or control of certain premises; (2) that a female was present on those premises for the purpose of unlawfully having sexual intercourse, and (3) that the defendant induced or knowingly suffered the female's presence on the premises for that purpose.

Commonwealth v. *Bucuvalas*, *supra*, Mass. App. Ct. Adv. Sh. (1978) at 127. This definition is fully in accord with prior definitions of the statute and, thus, does not represent a novel interpretation of the statute. See *Commonwealth* v. *Martin*, 304 Mass. 320, 322 (1939). The gravamen of the offense is the purpose for which the female is on the premises, not the conduct that occurred there.

At the petitioner's trial, the Commonwealth chose to introduce evidence that Ms. Peria had committed fellatio upon the male customer. While the failure to introduce this evidence would not have been fatal to the charge, the Commonwealth introduced it to aid the court and the jury in inferring what Ms. Peria's purpose was.

> Peria's employment as an entertainer in the lounge does not rule out the inference that her duties also included

> the performance of sexual services. Given the type of establishment, Peria's occupation and costume, and her response to the barmaid's call and subsequent performance of fellatio for payment, it was open for the jury to determine as a matter of fact that Peria was available for sexual intercourse with customers who desired such services.

Commonwealth v. *Bucuvalas, supra,* Mass. App. Ct. Adv. Sh. (1978) at 128.

Petitioner's argument, then, that his conduct did not fall within the terms of the statute since only fellatio and not coitus occurred, simply misconstrues the elements of the offense. That Ms. Peria performed fellatio is unnecessary to the Commonwealth's burden of proof, and, at best, merely raises a collateral issue not worthy of review by this Court.

B. *M.G.L. c. 272, § 6, is Sufficiently Precise to have Given the Petitioner Notice that his Conduct was Illegal.*

In addition to affirming the petitioner's conviction on adequate state grounds, the Appeals Court briefly dismissed the petitioner's argument that the term "sexual intercourse" could not constitutionally be defined to have included Ms. Peria's performance of fellatio. *Commonwealth* v. *Bucuvalas, supra,* Mass. App. Ct. Adv. Sh. (1978) at 132. Thus, the petitioner, so the argument goes, lacked adequate notice of the wrongfulness of his conduct (petitioner's brief, pp. 13-15). For the reasons stated *supra* at 5-6, this argument is irrelevant to the issues in the case. Nevertheless, judicial precedent in Massachusetts does not attribute the narrow definition to "sexual intercourse" that the petitioner seeks to assert.

It is fundamental that the state courts are the ultimate expositors of state law. *Mullaney* v. *Wilbur,* 421 U.S. 684, 691 (1975). Only in rare instances will this Court reexamine a state court's construction of its own statute. See *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 129 (1945). Thus, if in interpreting a statute the state court unforeseeably expands narrow and precise statutory language, review by this Court may be appropriate. *Bouie* v. *City of Columbia,* 378 U.S. 347, 351 (1964). However, in considering such a claim, it is well settled that ". . . the Due Process Clause prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Rose* v. *Locke,* 423 U.S. 48, 49 (1975), quoting from *United States* v. *Harriss,* 347 U.S. 612, 617 (1954). The respondent submits that the petitioner could reasonably have understood that his conduct was prohibited by M.G.L. c. 272, § 6.

While the term "sexual intercourse" had not been specifically defined by prior case law, its common law equivalent, "carnal knowledge," has been defined.[3] In *Commonwealth* v. *Squires,* 97 Mass. 59, 61 (1867), the Massachusetts Supreme Judicial Court in discussing the elements of the Massachusetts rape statute (Gen. Sts. c. 172, § 16)[4] defined carnal knowledge in the following manner.

> . . . from very early times, in the law, as in common speech, the meaning of the words "carnal knowledge" of a woman by a man has been sexual bodily connection; and these words, without more, have been used

[3] The petitioner substantially relies on the definition of "carnal knowledge" in support of his argument (petitioner's brief, p. 10).

[4] The present Massachusetts rape statute appears at M.G.L. c. 265, § 22, as amended by St. 1974, c. 474, § 1.

> in that sense by writers of the highest authority on criminal law, when undertaking to give a full and precise definition of the crime of rape, the highest crime of this character. (Citations omitted.)

See also *Commonwealth* v. *McCan*, 277 Mass. 199, 203 (1931).

While one dictionary definition of "sexual intercourse" is as the petitioner asserts, it is also defined in broader terms. For example, Webster's Third New International Dictionary (1964) additionally defines the term as "sexual connection especially between humans."[5] The construction of the term, then, by the Massachusetts Appeals Court is fully in accord with prior definitions as well as with the term's commonly accepted meaning. Thus, the petitioner cannot complain that he had no warning of the term's meaning.

The petitioner also argues that since Ms. Peria's act was constitutionally protected, his conduct could not have violated the law. This contention totally ignores Massachusetts' historic prohibition against commercial sex, i.e., prostitution. Although the Supreme Judicial Court has held that fellatio engaged in by consenting adults in private is not a crime, *Commonwealth* v. *Balthazar*, 366 Mass. 298, 302 (1974), it has never held that similar acts engaged in for commercial gain were not criminal. In fact, recently the Supreme Judicial Court upheld the Massachusetts prostitution statute on the ground, *inter alia*, that commercial sex and its solicitation were constitutionally distinguishable from private, adult conduct. *Commonwealth* v. *King*, Mass. Adv. Sh. (1977) 2636, 2646. Thus, since commercial

[5] The petitioner cites Webster's Third New International Dictionary as authority, as well, but he mentions only one of several definitions (petitioner's brief, p. 10).

sex has been illegal in Massachusetts historically, the petitioner cannot complain that the Appeals Court's construction of M.G.L. c. 272, § 6, improperly expanded the meaning of the term "unlawful sexual intercourse" to include commercial sex.[6]

II. The Petitioner's Claim that the Commonwealth's Evidence was Insufficient Fails to Raise a Federal Question.

It is well settled that this Court will not review questions of the sufficiency of the evidence against a state defendant except in rare instances. *Thompson* v. *Louisville*, 362 U.S. 199 (1960). The Due Process Clause of the Fourteenth Amendment is violated only when a conviction rests upon no evidence at all. *Id.*

In affirming the petitioner's conviction, the Appeals Court found that there was ample evidence on each element of the offense charged against the petitioner to warrant the trial judge's denial of the petitioner's motion for a directed verdict. *Commonwealth* v. *Bucuvalas, supra*, Mass. App. Ct. Adv. Sh. (1978) at 127-128. The circumstances of Ms. Peria's employment at the lounge, her costume, and her acceptance of $50 from the male customer for performing fellatio, fully support the reasonable inference that her purpose was to engage in unlawful sexual intercourse. As argued *supra* at 5-6, that Ms. Peria did not, in fact, engage in sexual intercourse is not fatal to the petitioner's conviction.

The petitioner also argues that there was no evidence introduced from which the jury could have inferred that he

[6] The petitioner does not contend that Ms. Peria's act was not performed in return for $50, nor did he assert this in the state courts.

had knowledge of Ms. Peria's purpose (petitioner's brief, pp. 23-24). This contention is totally without merit, for, while there was no direct evidence of the petitioner's knowledge, the circumstantial evidence introduced was ample. The petitioner's duties and responsibilities as president of the corporation and resident manager of the lounge were never disputed by the petitioner. Furthermore, the barmaid's complicity in the transaction, which evidences a managerial approval and involvement, as well as the use of the premises, warrant the inference that the petitioner at least tacitly approved of Ms. Peria's conduct.

Finally, as the Appeals Court held, the testimony of the male customer as to what occurred in the lounge was amply corroborated by the above mentioned evidence. Therefore, the petitioner cannot complain that the Massachusetts requirement, established by M.G.L. c. 272, § 11, that a defendant cannot be convicted on the testimony of one witness alone was violated. See *Commonwealth* v. *Williams*, 353 Mass. 233, 234 (1967); see also *Commonwealth* v. *Taschetta*, 252 Mass. 158, 160 (1925). Moreover, the Massachusetts requirement of corroboration is based upon a statute, not upon the federal Constitution. *Cf. Rose* v. *Locke*, *supra*, 423 U.S. at 49, n. 2.

Thus, the petitioner's assertion that there was no evidence to support his conviction is not borne out by the record. Since there was evidence introduced on each element of the offense which was sufficient to support the jury's verdict, the petitioner's claim does not raise a federal question.[7]

[7] The petitioner also seeks review by this Court on the ground that several of the trial court's instructions to the jury violated his right to due process (petitioner's brief, pp. 27-30) This claim also fails to raise a federal question since the assailed instructions did not ". . . so [infect] the entire trial that the resulting conviction violat[ed] due process." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). The charge taken as a whole fairly presented the case to the jury. See *Boyd* v. *United States*, 271 U.S. 104, 107 (1926). Moreover, for the reasons argued *supra* at 5-6, two of the petitioner's requested instructions were misstatements of the law (petitioner's appendix, pp. 2a, 3a). Finally, contrary to the petitioner's assertion, the trial court did instruct the jury that it had to find that the petitioner acted with knowledge.

Conclusion.

For the above stated reasons the petition for a writ of certiorari to the Appeals Court of the Commonwealth of Massachusetts should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
STEPHEN R. DELINSKY,
Assistant Attorney General,
Chief, Criminal Bureau,
BARBARA A. H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Division,
ROBERT S. POTTERS,
Assistant Attorney General,
Room 1805,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

Appendix.

Massachusetts General Laws, Chapter 272.

§ 6. [Penalty on Owner of Premises, etc.]

Whoever, being the owner of a place or having or assisting in the management or control thereof induces or knowingly suffers a female to resort to or be in or upon such place, for the purpose of unlawfully having sexual intercourse, shall be punished as provided in section three.

§ 11. [Evidence and Limitation.]

A person shall not be convicted under sections two to six, inclusive, upon the evidence of one witness only, unless his testimony is corroborated in a material particular, and prosecution for a violation of any of said sections shall not be commenced more than one year after the commission of the crime.